

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 196 of 1980

For Approval and Signature:

Hon'ble MISS JUSTICE R.M. DOSHIT

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

RAOL VISALSINH MULSINH, SINCE D/D THROUGH HIS HEIRS

Versus

BAI ANANDI W/O MULSHANKER LAXMIRAM, SINCE DECEASED

Appearance:

MR SK JHAVERI for Petitioners
MR NK MAJMUDAR for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 14/08/2000

29/08/2000

ORAL JUDGEMENT

Heard the learned advocates.

2. This appeal arises of the judgment and order dated 30th April, 1980 passed by the learned District Judge, Mehsana in Regular Civil Appeal No. 45 of 1977.

The appellants are the original defendants. It appears that the plaintiff-respondent had purchased a residential house [hereinafter referred to as, 'the suit premises'] consisting of two rooms situated at Mansa, District Mehsana from the erstwhile ruler Raolji Shri Sajjansinhji Takhatsinhji on 1st April, 1959. Since then, the plaintiff had been in continuous possession and enjoyment of the suit property. The plaintiff instituted the Regular Civil Suit No. 171 of 1973 in the Court of learned Civil Judge (JD), Vijapur. It was contended that the plaintiff was the lawful owner of the suit premises. That, on the southern wall of the suit premises there was a door and the ventilator at the ground floor and a window on the first floor. That the said door and the ventilator abutted on the open piece of land through which the plaintiff used to enjoy the air and light. Even the predecessor in title of the suit premises had enjoyed air and light through the said door and the ventilator and the plaintiff had an easement right to air and light through the said door and the ventilator. Both, the door and the ventilator, had a weather-shed through which the rain water was discharged on the open land. The plaintiff had, therefore, a right to discharge rain water through the said weather-shed. However, the defendants who owned the property on the otherside of the open land had started construction of a shed on the open land obstructing the passage of air and light through the ventilator and the door. The defendants had also threatened to close the ventilator by masonry work. The plaintiff, therefore, prayed that defendants be permanently restrained from closing the ventilator on the southern wall of the suit premises and to restrain the defendants from putting up any construction causing obstruction of passage of light and air through the door and the ventilator on the southern wall of the suit premises or to do any act which should infringe the plaintiff's right to discharge rain water through the weather-shed on the door and window of the southern wall of the suit premises. The plaintiff also prayed for mandatory injunction directing the defendants to remove the construction they had already put up on the open land. The suit was contested by the defendants. The defendants filed written statement at Exhs. 38 & 43. It was alleged that originally the southern side of the suit premises was completely closed and the door and ventilator on the ground floor were placed later, some 10 years before the date of the suit. It was also contended that the son of the plaintiff had entered into an agreement (Ex.79) with the defendants and had agreed that the defendants may close the ventilator. The suit was tried by the learned Joint Civil Judge (JD), Vijapur.

The learned Trial Judge found that the plaintiff had an easementary right to air and light through the door and ventilator on the southern wall of the suit premises. That pending the suit, the defendants had closed the ventilator by masonry work and thus had destroyed the evidence of easementary right. It further held that the son of the plaintiff had no right to enter into the agreement Exh.79. The learned Judge by his judgment and order dated 31st January, 1977 decreed the suit. A permanent injunction was issued restraining the defendants from obstructing the right of easement of the plaintiff to take light and air and to discharge rain water from the southern side window and door and to use right of way through the southern side door. It was further ordered that the defendant no. 1 should open up the ventilator on the southern wall of the suit premises at his own costs within a period of one month and he was further restrained from obstructing the right of light and air through the ventilator on the southern wall of the suit premises. Feeling aggrieved, the plaintiff preferred Regular Civil Appeal No. 45 of 1977 in the Court of District Judge, Mehsana. The defendants preferred the cross objections. By judgment and order dated 30th April, 1980 passed by the learned District Judge, Mehsana, the appeal was allowed and the cross objections too were partially allowed. The directions issued by the trial Court were modified to the effect that the defendants were perpetually restrained from obstructing the light and air through the southern side door and ventilator and were directed to remove construction blocking the ventilator and the roof of the shed constructed by them above the ventilator within one month at their own costs. The defendants were perpetually restrained from making any construction so as to obstruct the plaintiff in using the southern side door for egress and ingress and so as to damage the weather shed of southern side door and also not to disturb the easement right of the plaintiff to discharge the rain water of the weather shed of the door. Feeling aggrieved, the defendants have preferred the present appeal.

Mr. Jhaveri has submitted that apart from the door and the ventilator on the southern wall, there are two other ventilators on the western wall of the suit premises. Sufficient air and light is enjoyed by the plaintiff through the western wall. The Lower Appellate court has also recorded a categorical finding that, 'there are two doors and aperture [Jaliya] in the western side wall of the room and, therefore, the light and air are not likely to be diminished by blocking the Jalia and

discomfort is not likely to be caused by blocking the Jaliya and the value is not likely to be diminished'. Mr. Jhaveri has submitted that the learned Judge, having recorded the finding that the obstruction to the passage of air and light was not likely to diminish the passage of air and light to the suit premises and having held that the dominant heritage enjoyed by the plaintiff had not diminished in value, he was not right in issuing mandatory injunction directing the defendants appellants to remove the obstruction from the western wall and in restraining the defendants-appellants from obstructing the passage of air and light through the ventilator on the western wall. He has, therefore, relied upon the explanation 1 to Section 33 of the Indian Easement Act, 1882 and the judgment of this Court in the matter of VAGHELA VAKHATSINH AGARSINH Vs. PARMAR LALJI KHODIDAS [AIR 1975 (Gujarat) 109]. Section 33 of the Act and the Explanation-I thereto reads as under :-

``33. The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto; provided that the disturbance has actually caused substantial damage to the plaintiff.

Explanation-I The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section 34."

29.08.2000

After the judgment was pronounced in the open Court on 14th August, 2000 and was partially transcribed, the appeal was posted for further hearing today. Heard the learned advocates.

In the matter of Vaghela Vakhatsinh Agarsinh [Supra], a similar issue was raised before this Court for consideration. The question was whether a mandatory injunction could have been granted wherein infringement of right of easement of free passage of air and light was alleged. Considering the language of Section 33 of the

Act and the judgment of the Hon'ble Supreme Court in the matter of Chapsibhai Dhanjibhai Dand v. Purshottam [AIR 1971 SC 1878], the Court held that, ``I am unable to agree with him. The words `affecting the evidence of the easement' used in Explanation I would not apply to the disturbance of an easement regarding right to the free passage of air or light. Illustration `A' seems to indicate that this part would apply to the easement of right of way. As already explained by the Supreme Court in the case referred to above, under Explanation-II read with Explanation-I to the section where the disturbance pertains to the right of free passage of light no damage would be substantial unless it materially diminished the value of the dominant heritage and where the disturbance was to the right of free passage of air damage was substantial if it interfere materially with the physical comfort of the plaintiff." From the above judgment, it would be clear that mere obstruction to free passage of air and light would not entitle the plaintiff to mandatory injunction. Over and above obstruction to free passage of air and light, the plaintiff is also required to establish that such infringement has resulted into a substantial damage, as provided in Explanation-I to Section 33 of the Act. In the present case, the lower appellate Court has categorically found that the obstruction in question did not diminish the light and air to the suit premises and was not likely to cause discomfort to the plaintiff. However, the learned Judge has proceeded on the basis that the construction of masonry wall closing the ventilator amounts to damage to the evidence of easementary right, and therefore, substantial damage can be said to have been caused to the plaintiff within the meaning of Explanation-I to Section 33 of the Act. I am afraid, the reasoning given by the learned Judge cannot be sustained in view of what is held by this Court in the above referred matter of Vaghela Vakhatsinh [Supra]. This Court has categorically held that the words, `affecting the evidence of the easement' used in Explanation would not apply to the disturbance of an easement regarding right to the free passage of air or light and that it would apply to the easement of right of way. It is not even the case of the plaintiff that the plaintiff's easement of right of way has been damaged by affecting the evidence of the easementary right. In that view of the matter, the learned Judge was not right in issuing the mandatory injunction as regards the suit ventilator.

In view of the above discussion, the appeal is partly allowed. The order restraining the defendants-appellants from obstructing the air and light

through the south side door and Jaliya [aperture, Ventilator] and to remove construction blocking Jaliya [Aperture, Ventilator] and the roof of shed constructed by them above the Jaliya [Aperture, Ventilator] is quashed and set-aside. The direction restraining the defendants-appellants from making any construction so as to obstruct the plaintiff in using the south side door for egress and ingress and so as to damage the weather shed of the south side door and also not to disturb the easement right of the plaintiff to discharge the rain water of the weather shed of the door is confirmed. The appeal is allowed to the above extent. The parties shall bear their own costs.

Prakash*